Supreme Court, U.S.
FILED
APR 15 1996
CLERK

(2)

No. 95-1288

In The

Supreme Court of the United States

October Term, 1995

ALL AMERICAN ASPHALT, DANIEL SISEMORE, and MICHAEL RYAN,

Petitioners,

v.

JAMES HYLES, DOUGLAS MEARS, DERRICK SOTO and GREGORY DENNIS,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Two

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM REHWALD, CA SB 51396
Counsel of Record
LAWRENCE MATTHEW GLASNER, CA SB 142677
DANIEL CHALEFF, CA SB 173028
REHWALD RAMESON LEWIS & GLASNER
5855 Topanga Canyon Blvd. #400
Woodland Hills, CA 91367-4600
(818) 703-7500

Attorneys for Respondents James Hyles, Douglas Mears, Derrik Soto and Gregory Dennis

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

RESPONDENTS' BRIEF IN OPPOSITION 1

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF FACTS 1

PROCEEDINGS BELOW 3

REASONS FOR DENYING THE WRIT 5

The Unpublished Decisions Below, Refusing to Grant Summary Judgment on Grounds of Preemption by the National Labor Relations Act, Are Not Final Judgments That May be Reviewed by This Court, and in Any Event, Neither Conflict With Any Decisions of This Court Or Other Lower Courts, Nor Present a Significant Issue of Federal Law 5

1. This Court does not have Jurisdiction Under 28 U.S.C. § 1257 Because There has been No Final Judgment Below 5

2. Neither *Rodriquez v. Yellow Cab Co-Op, Inc.* nor *Platt v. Jack Cooper Transport Co., Inc.*, Provide any Basis to Grant Certiorari 6

3. Respondents' Activities do not Constitute Protected Activity and are Merely a Peripheral Concern to the NLRB 8

4. Respondents' Regulated Conduct Touches an Interest Deeply Rooted in Local Feeling and Responsibility 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

State Cases

Balog v. LRJV, Inc., 204 Cal.App.3d 1295, 250 Cal.Rptr. 766 (1988) 10, 11

Hentzel v. Singer Co., 138 Cal.App.3d 290, 188 Cal.Rptr. 159 (1982) 10

Rodriguez v. Yellow Cab Co-Op., Inc., 206 Cal.App.3d 668, 253 Cal.Rptr. 779 (1988) 6, 7, 8

Federal Cases

Belknap, Inc. v. Hale, 463 U.S. 491 (1983) 9

Meagher v. Minnesota Thresher Mfg. Co., 145 U.S. 608 (1892) 5

Platt v. Jack Cooper Transport Co., Inc., 959 F.2d 91 (8th Cir. 1992) 6, 7, 8

Pope v. Atlantic Coast Line R. Co., 345 U.S. 379 (1953) 6

Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987) 8

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 10, 11

Southern Pacific Co. v. Gileo, 351 U.S. 493 (1956) 5

Werner v. City Council of Charleston, 151 U.S. 360 (1894) 5

Statutes

28 U.S.C. § 1257 ..... 1, 5

California Labor Code § 1102.5 3

TABLE OF AUTHORITIES – Continued

Page

California Labor Code §§ 6310, 6311, 6400, 6401, 6402, 6403, and 6404 3

National Labor Relations Act, 29 U.S.C. §§ 7 and 8 ...4, 8

Labor Management Relations Act 29 U.S.C. § 158 ("Section 301") 3

OTHER

Meyers Industries, Inc., 268 N.L.R.B. 493 (1984) (*Meyers I*) 8

Meyers Industries, Inc., 281 N.L.R.B. No. 118 (1984) (*Meyers II*) 8

APPENDIX

A. California Labor Code § 1102.5 1

B. California Labor Code § 6310 1

C. California Labor Code § 6311 2

D. California Labor Code § 6400 3

E. California Labor Code § 6401 3

F. California Labor Code § 6402 4

G. California Labor Code § 6403 4

H. California Labor Code § 6404 4

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents James Hyles, Douglas Mears, Derrick Soto and Gregory Dennis respectfully oppose All American Asphalt, Daniel Sisemore, and Michael Ryan's petition for a writ of certiorari to review the order of the California Court of Appeal, Fourth Appellate District, Division Two.

OPINIONS BELOW

The California Court of Appeal, Fourth Appellate District, Division Two, denied Petitioners' Writ in its entirety. The California Supreme Court denied Petitioners' request for review.

JURISDICTION

Petitioners incorrectly argue that jurisdiction of this Court is proper pursuant to 28 U.S.C. § 1257. Respondents maintain that this Court does not have jurisdiction because there has been no final judgment below.

STATEMENT OF FACTS

In April of 1991, Petitioner ALL AMERICAN ASPHALT opened a new addition to its rock finishing plant, despite the fact that many basic safety features were not in place. Respondent HYLES, an employee of Petitioner since July 1985 and lead man at the plant,

believed the new finish plant was unsafe because guards were not installed, cat walks were not completed, handrails were missing, and tripcords were not operational.

Respondents MEARS, DENNIS and SOTO complained to Respondent HYLES, their supervisor, about the unsafe working conditions at the plant. Ultimately, Respondent HYLES took a video of the plant in operation in order to document the safety violations. Respondent HYLES then took the videotape to the Mine Safety and Health Administration (MSHA) who immediately conducted an investigation and shut down the plant.

Thereafter, the four Respondents were laid off. They filed grievances under the Collective Bargaining Agreement between Petitioner and Operating Engineers Local Union #12, and also filed complaints with MSHA, contending that each of them had been laid off in retaliation for their complaining to MSHA. Respondents were subsequently reinstated pending a hearing before an Administrative Law Judge. Six weeks after reinstatement, Petitioner again laid off Respondents, prompting Respondents to file a second set of complaints with MSHA for retaliatory termination.

Petitioner again reinstated Respondents until the consolidated MSHA complaints were heard before the Administrative Law Judge. At the conclusion of the administrative hearing, the Judge found that Petitioner had discriminated against Respondents and ordered Petitioner to reinstate Respondents with back pay.

PROCEEDINGS BELOW

Respondents initially were represented by two different attorneys and filed two separate actions in California state court on July 2, 1993 and July 7, 1993, alleging wrongful termination in violation of public policy and intentional infliction of emotional distress. Respondents alleged that the discharges were tortious and that the Petitioners contravened the public policy of the State of California which prohibits retaliation against employees because of their report and disclosure of information to a governmental agency which they reasonably believe constitutes violations of state or federal laws, including reports of unsafe working conditions and reports of discrimination, as embodied in California Labor Code § 1102.5, California Labor Code §§ 6310, 6311, 6400, 6401, 6402, 6403, and 6404. (App. 1-4) Petitioners then began a course of procedural maneuvering, culminating in this petition for a writ of certiorari, that has prevented this case from being brought to trial for almost three years.

Thus, in September and October, 1993, Petitioners removed both actions to the United States District Court for the Central District of California, and then moved to dismiss, alleging that Respondents had not stated a valid claim for wrongful discharge and that, therefore, Respondents' claims necessarily depended on the Collective Bargaining Agreement and so were preempted by Section 301 of the Labor Management Relations Act ("LMRA"). In late 1993 and 1994, respectively, the federal court ruled that neither case was preempted by Section 301 and that both stated viable claims for wrongful discharge under California law. Accordingly, the federal court remanded both cases to state court.

Petitioners then filed an answer to the complaint, denying that it had taken any actions against the Respondents because of their safety complaints to MSHA, and the parties proceeded to the discovery phase. Petitioners then moved for summary judgment or summary adjudication of issues, contending that Respondents' claims are preempted by sections 7 and 8 of the National Labor Relations Act ("NLRA").

On August 1, 1995, the Superior Court denied the motion. Petitioners then sought a writ of mandamus or prohibition from the California Court of Appeals, asking that it compel the Superior Court to grant summary judgment in its favor. The Court of Appeals denied this petition by an unpublished order on September 27, 1995. Two months later, the California Supreme Court denied discretionary review. Petitioners now seek review of the denial of their summary judgment motion in this Court as well.

REASONS FOR DENYING THE WRIT

The Unpublished Decisions Below, Refusing to Grant Summary Judgment on Grounds of Preemption by the National Labor Relations Act, Are Not Final Judgments That May be Reviewed by This Court, and in Any Event, Neither Conflict With Any Decisions of This Court Or Other Lower Courts, Nor Present a Significant Issue of Federal Law

1. This Court does not have Jurisdiction Under 28 U.S.C. § 1257 Because There has been No Final Judgment Below.

The first reason why the petition should be denied is that there has been no final judgment below, and therefore there is no jurisdiction under 28 U.S.C. § 1257. The State Superior Court refused to grant a motion for summary judgment, and the State Appellate Courts refused to grant mandamus compelling the grant of summary judgment. This Court has repeatedly held that the decision of a State Appellate Court, affirming a trial court's refusal to dismiss an action, is not final, and consequently that review cannot be had under Section 1257 and its predecessor provisions. *Werner v. City Council of Charleston*, 151 U.S. 361 (1894); *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 610-611 (1892). See also *Southern Pacific Co. v. Gileo*, 351 U.S. 493, 496 (1956) (State Supreme Court reversal and remand for trial on merits of federal issue held not to be final judgment).

In this case, Petitioners have raised a number of defenses, some under state law and some under federal law, and have denied the factual predicate for the application of their defense of federal preemption – that is, they deny that Respondents' safety complaints, whether

concerted or otherwise, had anything to do with their layoffs. It is thus quite possible that the case may be resolved in the state courts without any need to consider the federal preemption defense, and indeed the facts as proved during the trial will make it clear that the Respondents' claims do not rest on any contention that their whistleblowing activities were concerted. Accordingly, there is no basis for a grant of certiorari under Section 1257. See *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 381-382 (1953).

2. Neither *Rodriguez v. Yellow Cab Co-Op, Inc.* nor *Platt v. Jack Cooper Transport Co., Inc.* Provide Any Basis to Grant Certiorari.

Petitioners base their request for review on the contention that the unpublished denial of a writ of mandamus below conflicts with a published, plenary decision of the California Court of Appeals in a different case, *Rodriguez v. Yellow Cab Co-Op., Inc.*, 206 Cal.App.3d 668, 253 Cal.Rptr. 779 (1988), and with a decision of the United States Court of Appeals for the Eighth Circuit in *Platt v. Jack Cooper Transport Co., Inc.*, 959 F.2d 91 (8th Cir. 1992). Neither provides any basis for a grant of certiorari.

The alleged conflict with *Rodriguez* is surely no reason for the Court to review this case; if anything, *Rodriguez* provides a reason why review should be denied at this juncture in the proceedings. Generally speaking, certiorari may be granted to resolve conflicts among the circuits or among the courts of the various states. Alleged conflicts among decisions of the California Appellate Courts are, at best, a reason for that state's Supreme

Court to step into the fray, not a reason for this Court to take the case.

Indeed, what *Rodriguez* shows is that, when a California Appellate Court receives a plenary appeal in a case where there is a sound reason for preemption by the NLRA, it gives careful consideration to the preemption defense and can be relied upon to dismiss the state law claim if that result is appropriate on the facts of the particular case. This Court, therefore, need not intervene at this preliminary state of the litigation, reserving the possibility of review if, after trial, the facts as developed by the testimony show that the real basis for Respondents' claims is their concerted action, rather than the state policy of protecting the rights of whistleblowers.

Nor does the order below conflict with *Platt*. In that case, the Court of Appeals noted that, before the Petitioner claimed he had been fired in retaliation for activities protected by the public policy of the state, the plaintiff had filed two separate unfair labor practice charges, alleging that he had been terminated because of protected, concerted activities undertaken on behalf of the union. *Platt v. Jack Cooper Transport Co., Inc.*, 959 F.2d 91 (8th Cir. 1992). The Court of Appeals deemed this fact "highly relevant" in deciding, "on the facts of this case," that the state claims were preempted, because the risk of interference with the Board's jurisdiction is obvious and substantial "when an unsuccessful charge to the Board is recast as a state law claim." *Id.* at 95. The court was careful not to disclaim any general view on whether state claims for discharge based on whistleblowing are generally preempted by the NLRA because the local interest

exception "requires a more fact-sensitive approach." *Id.* at 95-96.

Here, the Respondents have never contended that their layoffs were motivated by concerted or union activity, and they have not filed any charges with the NLRB, not to speak of later recasting an NLRB charge as a state law action. Accordingly, the unpublished decision below, which cited both *Platt* and *Rodriguez* as authority for its determination of non-preemption, does not conflict with those decisions.

3. Respondents' Activities do not Constitute Protected Activity and are Merely Peripheral Concern to the NLRB.

Respondents' activities do not constitute protected activity contemplated by § 7 of the NLRA. First, the reports and complaints of each of the Respondents to the employer and to the governmental agency were not action engaged in with or on the authority of other employees. *Meyers Industries, Inc.*, 268 N.L.R.B. 493, 497 (1984) (*Meyers I*). Purely unilateral activity is not concerted activity within the meaning of the NLRA, as the intent of § 7 is to protect "individual employees [who] seek to initiate or to induce or to prepare for group action", and "individual employees bringing truly group complaints to management". *Meyers Industries, Inc.*, 281 N.L.R.B. No. 118 (1986), at 15. (*Meyers II*). *See, Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). None of the Respondents engaged in such group action.

Even if Respondents' individual activities were arguably concerted activity within the meaning of § 7, the

controversy presented to the state court in their claim for wrongful termination in violation of state public policy is different from, and not identical to, that which could be presented to the Board. *Belknap, Inc. v. Hale*, 463 U.S. 491, 510 (1993). This is the critical inquiry when applying the *Garmon* doctrine in determining that a state may regulate conduct that is of only peripheral concern to the NLRA or that is so deeply rooted in local law that the courts should not assume that Congress intended to preempt the application of state law. *Id.* at 509.

In the instant case, the state court will be concerned with whether Petitioners' conduct was in retaliation for each Respondents' conduct in making complaints and reports to a governmental agency as well as their employer concerning unsafe working conditions, conduct which is explicitly protected by California law and public policy. Whether the conduct was "concerted" or "group" action would not concern the state court, just as whether Respondents' conduct furthered a state public policy would not concern the Board.

In addition, remedies sought in the Respondents' state court action which include, but are not limited to, lost benefits, emotional distress damages and punitive damages, are markedly different than the remedies offered by the Board: reinstatement and lost wages. Therefore, the state court does not offer Respondents an alternative forum for obtaining relief that the Board can provide. *Id.* at 510.

Consequently, maintaining Respondents' state court action does not interfere with the Board's determination of matters within its jurisdiction and such an action is of

no more than peripheral concern to the Board and federal law. At the same time, California has a substantial interest in state vindication of the rights of employees to further the public policies expressed in Respondents' public policy claims. Indeed, the state's interests here "clearly outweigh any possible interference with the Board's function" that may result from permitting the Respondents' state court claim to proceed. *Id.* at 511.

4. Respondents' Regulated Conduct Touches an Interest Deeply Rooted in Local Feeling and Responsibility.

An exception to preemption of state action under *Garmon* exists where the regulated conduct touches an interest so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, the Court could not infer that Congress had deprived the state's power to act. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

This exception is illustrated in the case of *Balog v. LRJV, Inc.*, 204 Cal.App.3d 1295, 250 Cal.Rptr. 766 (1988).[1] The Petitioner in *Balog* alleged he was wrongfully terminated by his employer in retaliation for both refusing to engage in unfair labor practices and refusing to cooperate in alleged violations of local health and safety rules. The court found that, although the Respondents's claim of

---

[1] *See also, Hentzel v. Singer Co.*, 138 Cal.App.3d 290, 188 Cal.Rptr. 159, 163 n. 4 (1982), finding that the safety and health complaints of a worker were not concerted activity under the NLRA.

termination for refusal to engage in unfair labor practices was itself an unfair labor practice and would be preempted by the NLRA, the employer's conduct in allegedly terminating Balog for refusing to violate California health and safety regulations were not even "arguably" unfair labor practices under the *Garmon* doctrine. The could held that Balog's conduct was "clearly conduct which touches interests deeply rooted in local feeling and responsibility, and which is, if any concern to the NLRA, of only peripheral concern" and therefore not preempted by the NLRA under *Garmon*.

> [D]efendants should not be able to escape the jurisdiction of California courts simply because, in addition to allegedly undertaking violations of health and safety regulations which are of compelling local importance and interest, they had the good fortune to also undertake the commission of NLRB-defined unfair labor practices. *Id.*, at 773.

Like the employer in *Balog*, the Petitioners' conduct in retaliating against Respondents for their safety complaints is not even "arguably" an unfair labor practice under the *Garmon* doctrine. Additionally, the Respondents' conduct touches interest deeply rooted in local feeling and responsibility, and the NLRA's concern if any, is only peripheral. Therefore, like *Balog*, Respondents' complaint should not be preempted by the NLRA.

CONCLUSION

The unpublished decisions below, refusing to grant summary judgment on grounds of preemption by the

National Labor Relations Act, are not final judgments that may be reviewed by this Court, and in any event, neither conflict with any decisions of this Court or other lower courts, nor present a significant issue of federal law. Further, Respondents' activities are merely a peripheral concern to the NLRB, and Respondents' regulated conduct touches an interest deeply rooted in local feeling and responsibility. Therefore, Respondents respectfully submit that their complaint for wrongful termination in violation of state public policy should not be preempted by the NLRA, and this Court should deny Petitioners' request for a Writ of Certiorari in its entirety.

Dated: April 12, 1996

Respectfully submitted,

WILLIAM REHWALD, CA SB 51396
Counsel of Record
LAWRENCE MATTHEW GLASNER,
CA SB 142677
DANIEL CHALEFF, CA SB 173028
REHWALD RAMESON LEWIS & GLASNER
5855 Topanga Canyon Blvd. #400
Woodland Hills, CA 91367-4600
(818) 703-7500

Attorneys for Respondents
James Hyles, Douglas Mears,
Derrick Soto and Gregory Dennis

APPENDIX

A. California Labor Code § 1102.5 states:

(a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.

(b) No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.

(c) This section shall not apply to rules, regulations, or policies which implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950), the physician-patient privilege of Article 6 (commencing with Section 990) of Chapter 4 of Division 8 of the Evidence Code, or trade secret information.

B. California Labor Code § 6310 states:

(a) No person shall discharge or in any manner discriminate against any employee because the employee has done any of the following:

(1) Made any oral or written complaint, to the division, other governmental agencies having statutory responsibility for or assisting the division with reference

to employee safety or health, his or her employer, or his or her representative, or

(2) Instituted or caused to be instituted any proceeding under or relating to his or her rights or has testified or is about to testify in the proceeding or because of the exercise by the employee on behalf of himself, herself, or others of any rights afforded him or her.

(3) Participated in an occupational health and safety committee established pursuant to Section 6401.7.

(b) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because the employee has made a bona fide oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his or her employer, or his or her representative, of unsafe working conditions, or work practices, in his or her employment or place of employment, or has participated in an employer-employee occupational health and safety committee, shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. Any employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor.

C. California Labor Code § 6311 states:

No employee shall be laid off or discharged for refusing to perform work in the performance of which this code, including Section 6400, any occupational safety or health standard or any safety order of the division or standards board will be violated, where the violation would create a real and apparent hazard to the employee or his or her fellow employees. Any employee who is laid off or discharged in violation of this section or is otherwise not paid because he or she refused to perform work in the performance of which this code, any occupational safety or health standard or any safety order of the division or standards board will be violated and where the violation would create a real and apparent hazard to the employee or his or her fellow employees shall have a right of action for wages for the time the employee is without work as a result of the layoff or discharge.

D. California Labor Code § 6400 states:

Every employer shall furnish employment and a place of employment which are safe and healthful for the employees therein.

E. California Labor Code § 6401 states:

Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful. Every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees.

F. California Labor Code § 6402 states:

No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful.

G. California Labor Code § 6403 states:

No employer shall fail or neglect to do any of the following:

(a) To provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe.

(b) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe.

(c) To do every other thing reasonably necessary to protect the life, safety, and health of employees.

H. California Labor Code § 6404 states:

No employer shall occupy or maintain any place of employment that is not safe and healthful.